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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1943

No. 723

CITY OF LOS ANGELES (a municipal corporation), DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,

Petitioners,

vs.

NATURAL SODA PRODUCTS COMPANY (a corporation).

CITY OF LOS ANGELES (a municipal corporation), DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,

Petitioners,

vs.

NATURAL SODA PRODUCTS COMPANY (a corporation).

RESPONDENT'S REPLY TO PETITIONERS' REPLY ON MOTION FOR LEAVE TO PROCEED ON TYPEWRITTEN TRANSCRIPT.

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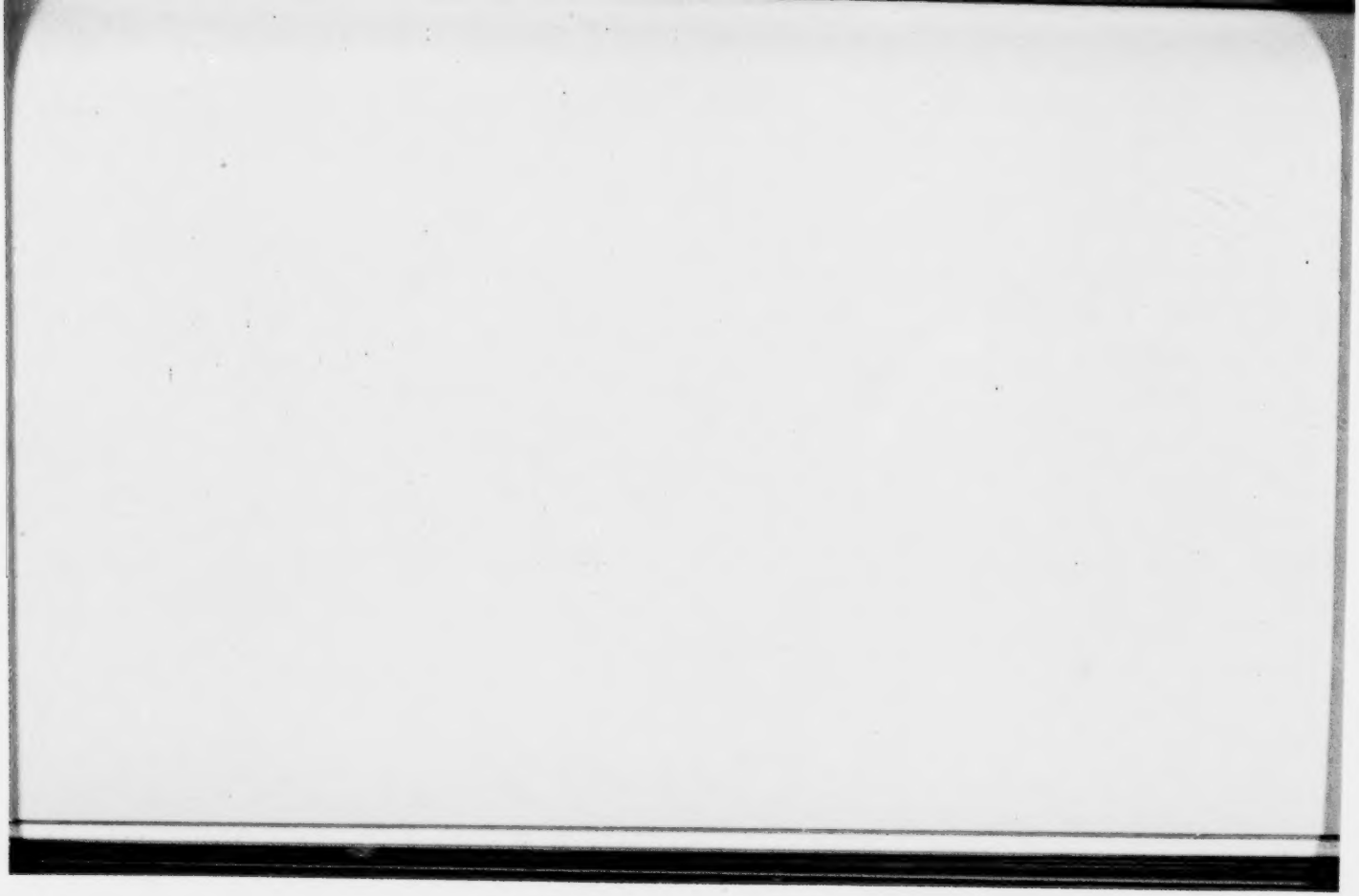

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RESPONDENT'S REPLY TO PETITIONERS' REPLY ON MOTION FOR LEAVE TO PROCEED ON TYPEWRITTEN TRANSCRIPT.

Since petitioners have questioned the accuracy of our statements regarding the raising of a federal question (Petitioners' Reply, p. 11), we respectfully ask leave to direct the Court's attention specifically to the record.

No federal question was raised in petitioners' demurrer (Cl. Tr. 272-321)[1] or amendment thereto (Cl. Tr. 341-345), or in the motion to strike portions of the complaint (Cl. Tr. 331-337), or in the briefs ("points and authorities") filed by petitioners in support of the demurrer (Cl. Tr. 322-328) and motion to strike (Cl. Tr. 338). No federal question was raised in the answer (Cl. Tr. 353-438) or its amendment (Cl. Tr. 513-517), although the amendment was filed after the trial. No federal question was raised in the motion for judgment and kindred motions made by petitioners at the conclusion of respondent's case, or in the rulings of the court on those motions (Rep. Tr. 2343-2350). No federal question was raised in petitioners' opening statement (Rep. Tr. 2352-2356). No federal question was mentioned or decided by the trial court in its opinion (Cl. Tr. 500-502), or in its findings of fact and conclusions of law (Cl. Tr. 519-561, 561-568) or judgment (Cl. Tr. 571-573). No federal question was raised in petitioners' motions for new trial (Cl. Tr. 577, 580), or in the orders of the court denying those motions (Cl. Tr. 588, 589, 591).

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[1]The record being unprinted, references in this brief are to the three volumes of unprinted Clerk's Transcript ("Cl. Tr."), and to the nine volumes of unprinted Reporter's Transcript ("Rep. Tr.").

Since petitioners prevailed in the companion injunction suit, we do not refer specifically to the pleadings in that suit. Those pleadings are in Cl. Tr., Vol. I, and contain no reference to a federal question. The injunction suit and damage suit were consolidated for trial (Cl. Tr. 114).

At the time the appeal in this case was taken,[2] Rule VIII of the Rules of the Supreme Court and District Courts of Appeal of the State of California provided:

> "Sec. 2. A statement of the question involved on an appeal in a civil action shall be set forth on the first page of the appellant's opening brief, and without any other matter appearing thereon."

No federal question was raised by petitioners in the "Statement of Questions Involved" filed by them in compliance with this rule. That statement, which appears in petitioners' opening brief in the state supreme court,[3] reads as follows:

> "STATEMENT OF QUESTIONS INVOLVED.
>
> (1) Is an appropriator from a stream emptying *naturally* into a *saline lake* obligated to a manufacturer of products from lake brines (a) to divert and/or conserve water *in excess* of appropriator's *needs* up to the *capacity* of its *aqueduct and reservoirs*,—same having excess capacity looking to *future growth* of needs,—or (b) to provide *additional* headwater *reservoirs* to *retain* the stream *flow* in *excess* of such *needs*?
>
> (2) Is manufacturer, because appropriator's *diversions* in *prior* years of *lower stream flow* constituted a *greater proportion* thereof, entitled to rely upon diversions up to such *capacity* in years when, due *solely* to *increased flow*, the *diversions* constituted a *less proportion* thereof?
>
> (3) Is appropriator obligated under Constitution, Art. XIV, Sec. 3, to *prevent* stream flow *not diverted*

[2]New appellate rules recently have been adopted in California.

[3]The original appeal in this case was taken to the state supreme court, and the opening brief was filed in that court. Thereafter the cause was transferred to the District Court of Appeal for initial hearing.

(because *not needed*) from *discharging* into *saline lake*?[4]

(4) Can loss of *prospective profits* from business interruption (a) constitute the measure of damages where such business is *non-unique;* or,—*losses* having resulted from *past experience,*—(b) be proven by *estimates* based upon a *doubling* of *plant capacity* (i) installed *after* such interruption, and (ii) *never* utilized *prior* to trial?

(5) Did damage, *inevitable* from water in saline lake, *occur* when lake reached *highest level,* or when it had *subsided* through evaporation?''

It is settled by California decisions that the California appellate courts are not required to pass on a question not stated as a "question involved" on the first page of the opening brief.[5]

Metzler v. Foster Holding Co. (1936) 5 Cal. (2d) 278, 282;

Caspar Lumber Co. v. Stowell (1940) 37 Cal. App. (2d) 58, 63.

The California courts also follow the general rule "that a constitutional question must be raised at the earliest opportunity or it will be considered as waived" (*Hershey v. Reclamation District No. 108* (1927) 200 Cal. 550, 564).

In this case neither appellate court passed upon a federal question.[6]

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[4]This reference is to the Constitution of the State of California.

[5]This is a rule of practice given effect by this Court. See *Bryant v. Zimmerman* (1928) 278 U.S. 63, 68-69.

[6]See the opinions of the District Court of Appeal and the Supreme Court printed in the appendices to the petition for writs of certiorari.

The references to federal questions quoted by petitioners from their briefs in the courts below (Petitioners' Reply, pp. 4-6, 7-8) are, we repeat, mere passing references in the course of argument extending over hundreds of printed pages.[7] No one of them appeared in any heading in any one of petitioners' briefs. Rule VIII, already referred to, further provided:

> "The brief or petition must present each point separately under an appropriate heading, showing the nature of the question to be presented or the point to be made."

Under California practice these headings in the brief are treated as, and are deemed to be, assignments of error, and the California courts repeatedly have held that they will not consider points not separately stated under an appropriate heading as required by Rule VIII. Thus, in *Superior Sand Co. v. Smith* (1937) 19 Cal. App. (2d) 166, 167 (hearing denied by the California Supreme Court, April 8, 1937), the court said:

> "Appellant has failed in his opening brief to present each point separately under an appropriate heading, showing the nature of the question to be presented and the point to be made. (Sec. 2, rule VIII, Rules for the Supreme Court and District Courts of Appeal of the State of California.)
>
> Mr. Presiding Justice Conrey in *Adams v. Standard Acc. Ins. Co.,* 124 Cal. App. 393 [12 Pac. (2d) 464], in commenting upon this provision of Rule VIII, *supra,* accurately states the requirement thus at page 394:
>
> 'Such assignment of error should take the form of one or more stated propositions, which, if sustained,

[7]There were 17 briefs, with a total of 1277 pages, filed in the District Court of Appeal and Supreme Court.

would lend reasonable support to appellant's demand for reversal of the judgment.'

This court has repeatedly held that it will not assume the task of searching the record for the purpose of discovering errors not pointed out by counsel. It is the duty of counsel to comply with rule VIII, *supra*, in its entirety. The provisions of this section are not mere technical requirements, but are prescribed for the purpose of facilitating disposition of cases upon appeal and directing the court's attention to the specific errors of law alleged to have been committed by the trial court.

For the foregoing reason the appeal is dismissed."

Dated, San Francisco, California,
March 15, 1944.

Respectfully submitted,

KENNETH FERGUSON,
FRANCIS R. KIRKHAM,
JESS G. SUTLIFF,
Counsel for Respondent